Filed 6/21/10 Estate of Mauzey CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

Estate of DON W. MAUZEY, Deceased.	
AIMEE SCARPINO, Petitioner and Respondent, v. JAMES MAUZEY et al., Contestants and Appellants.	E047596 (Super.Ct.No. RIP082449) OPINION

APPEAL from the Superior Court of Riverside County. Joan F. Burgess, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed.

Jimenez & Small, David G. Jimenez; Ritchie, Klinkert & McCallion and James E. Klinkert for Contestants and Appellants.

Carroll & Werner and Lee G. Werner for Petitioner and Respondent.

FACTUAL AND PROCEDURAL HISTORY

Don W. Mauzey died on June 2, 2002, in Riverside. His daughter Kelly Mauzey filed a petition to administer the estate, asserting that Mauzey died intestate. Kelly and her brother James Mauzey were his only children and thus the only heirs. The petition was granted on February 24, 2003.

In August 2003, the decedent's brother Larry Mauzey filed a successor petition to probate a will dated November 14, 1995. The will left $100 each to Kelly and James. It made bequests totaling $25,000 to another brother, Ronald Mauzey, and two nieces and a nephew of the decedent. The will left the remainder of the estate, which was estimated to exceed $1 million, to the decedent's parents, Ruth and Wayne Mauzey. Wayne Mauzey was by then deceased.

The court denied the successor petition, finding that it was untimely pursuant to Probate Code section 8226, subdivision (c).[1] Ruth Mauzey, the primary beneficiary under the will, filed a timely notice of appeal.

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[1] Probate Code section 8226, subdivision (b) provides that a will may be admitted to probate notwithstanding the prior admission to probate of another will or prior distribution of property in the proceeding, subject to subdivision (c). Subdivision (c) provides:

"If the proponent of a will has received notice of a petition for probate or a petition for letters of administration for a general personal representative, the proponent of the will may petition for probate of the will only within the later of either of the following time periods:

"(1) One hundred twenty days after issuance of the order admitting the first will to probate or determining the decedent to be intestate.

"(2) Sixty days after the proponent of the will first obtains knowledge of the will."

[footnote continued on next page]

While the appeal was pending, a new successor petition to probate the will was filed on behalf of Ronald Mauzey, who was then incarcerated in the state prison at Soledad, serving a sentence for murder. The court granted that petition, and James and Kelly appealed.

We consolidated the two appeals. We upheld both the order denying Larry Mauzey's successor petition for probate and the order granting Ronald Mauzey's successor petition. (*Estate of Mauzey* (Nov. 21, 2007, E038344, E041215) [nonpub. opn.].)

After Larry Mauzey filed his successor petition, James Mauzey filed a "will contest and grounds of opposition to probate" of the will. The first ground of opposition was that the successor petition was untimely, pursuant to Probate Code section 8226, subdivision (c). The second ground went to the validity of the purported will. The probate court bifurcated the proceeding and stayed the will contest pending its resolution of the issue of the timeliness of the petition.

The will contest continued to be stayed while the appeal from the order denying Larry Mauzey's successor petition was pending. Upon denial of review by the California Supreme Court and the issuance of the remittitur in that appeal, the court set a hearing on the will contest. Thereafter, James and Kelly Mauzey filed a "supplement" to "their"

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It was undisputed that Larry did not file the successor petition until more than 120 days had elapsed after the court issued its order for administration of the intestate estate and until more than 60 days had elapsed from the date he had knowledge of the will.

January 2004 will contest. (James was the sole contestant in the original will contest; the record does not reflect that Kelly joined in the contest.)

On June 8, 2008, Aimee Scarpino, née Mauzey, a niece of the decedent who is a beneficiary named in the contested will, filed a motion to dismiss the will contest. She stated that she had not been served with the will contest. She contended that Probate Code sections 8250 and 8110 require that all devisees named in a will must be served with a will contest. She contended that service must be made within three years after the commencement of the will contest, pursuant to Code of Civil Procedure section 583.210, and that dismissal was mandatory pursuant to Code of Civil Procedure section 583.250 because she had not been served within the three-year period. On November 19, 2008, the probate court dismissed the will contest, holding that dismissal was mandated by Code of Civil Procedure sections 583.210 and 583.250.[2]

James and Kelly Mauzey (hereafter sometimes referred to as contestants) filed a timely notice of appeal.

LEGAL ANALYSIS

CODE OF CIVIL PROCEDURE SECTIONS 583.210 AND 583.250 DO NOT APPLY TO WILL CONTESTS

As pertinent here, Probate Code section 8250 provides: "When a will is contested . . . , the contestant shall file with the court an objection to probate of the will. Thereafter, a summons shall be issued and served, with a copy of the objection, on the

[2] We discuss the provisions of all of these statutes below.

persons required by Section 8110 to be served with notice of hearing of a petition for administration of the decedent's estate. The summons shall be issued and served as provided in Chapter 4 (commencing with Section 413.10) of Title 5 of Part 2 of the Code of Civil Procedure." (Prob. Code, § 8250, subd. (a).) Probate Code section 8110 requires service on each heir of the decedent and on each devisee, executor and alternative executor named by the will. (Prob. Code, § 8110, subds. (a), (b).)

Code of Civil Procedure section 583.210, subdivision (a)[3] "provides that a summons and complaint 'shall' be served upon a defendant within three years after the action is commenced. Section 583.250, in turn, provides that the action 'shall' be dismissed if service is not made within the statutorily prescribed time and that the foregoing requirements 'are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute.' [Citation.]" (*Watts v. Crawford* (1995) 10 Cal.4th 743, 748.) Here, the summons and the will contest were served only on Larry Mauzey.[4] No proof of service of the summons on any of the devisees was filed, and by the time Scarpino filed her motion, more than three years had elapsed since the will contest was filed. Accordingly, if sections 583.210 and 583.250 apply to will contests, dismissal was mandatory unless one of the statutory exceptions applies. (*Watts*

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[3] All further undesignated statutory citations will refer to the Code of Civil Procedure. We will use the full statutory citation where necessary for clarity.

[4] Larry Mauzey was served on February 20, 2004, and filed a timely answer to the will contest on or about March 16, 2004. The answer was served on all of the devisees, including Aimee Scarpino, by mail.

v. Crawford, *supra*, at p. 748.) We conclude, however, that sections 583.210 and 583.250 do not apply to will contests.[5]

Sections 583.210 and 583.250 generally apply only to civil actions. (§ 583.120, subd. (a) ["This chapter applies to a civil action and does not apply to a special proceeding except to the extent incorporated by reference in the special proceeding."].) Probate proceedings are considered special proceedings. (See Cal. Law Revision Com. com., 16 West's Ann. Code Civ. Proc. (2010 supp.) foll. § 583.120, p. 118; 3 Witkin Cal. Procedure (5th ed. 2008) Actions, §§ 64-65, pp. 135-138.) There is no express provision in the Probate Code which incorporates either section 583.210 or section 583.250, nor is there any provision which explicitly provides for a time limitation on the service of a summons in a will contest. However, Probate Code section 1000 states, in pertinent part, "Except to the extent that this code provides applicable rules, the rules of practice applicable to civil actions . . . apply to, and constitute the rules of practice in, proceedings under this code." Scarpino contends that Probate Code section 1000 incorporates sections 583.210 and 583.250. This is a question of statutory interpretation, which we decide de novo. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.)

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[5] We asked for supplemental briefing to address this issue. Both parties responded.

In their original briefing, contestants urged that one or more of the statutory exceptions to the mandatory three-year service rule does apply. Because we conclude that the rule does not apply, we need not address those contentions.

"In construing a statute, our fundamental task is to ascertain the Legislature's intent so as to effectuate the purpose of the statute. [Citation.] We begin with the language of the statute, giving the words their usual and ordinary meaning. [Citation.] The language must be construed 'in the context of the statute as a whole and the overall statutory scheme, and we give "significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose."' [Citation.]" (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 83.) "If the statutory terms are ambiguous, we may examine extrinsic sources, including the ostensible objects to be achieved and the legislative history. [Citation.] In such circumstances, we choose the construction that comports most closely with the Legislature's apparent intent." (*Ibid*.) "'It is a well-settled maxim of statutory construction that "a statute is to be construed in such a way as to render it 'reasonable, fair and harmonious with [its] manifest [legislative] purposes . . . .' [citations], and the literal meaning of its words must give way to avoid harsh results and mischievous or absurd consequences."' [Citations.]" (*Starbucks Corp. v. Superior Court* (2008) 168 Cal.App.4th 1436, 1449.)

We conclude, based both on the history of the statutes in question and on the incompatibility of sections 583.210 and 583.250 with the nature of a will contest, that the Legislature did not intend to incorporate sections 583.210 and 583.250 into the will contest provisions of the Probate Code.

First, application of sections 583.210 and 583.250 is inconsistent with the nature of will contests and would have drastically different consequences than it does in civil

matters. In a civil matter, an action is dismissed pursuant to those sections only as to a specific defendant who was not timely served with the summons and complaint. If there are other defendants who were timely served, the action proceeds against them.[6] In a will contest, however, the individuals who must be served are not defendants; the contest is not against them but against the will itself. Consequently, the contest cannot be dismissed only as against an individual devisee who was not timely served. And, the contestant could not dismiss an unserved devisee in order to preserve the will contest. Accordingly, if section 583.210 applies, the failure to serve a single devisee or other interested person designated in Probate Code sections 8250 and 8110 will defeat the will contest, even if all other such persons have been served. This is an absurd and draconian result. The parties have not made us aware of any extrinsic source which indicates that the Legislature intended sections 583.210 and 583.250 to apply to will contests, and in the absence of any such indication, we will not presume that this result is what the Legislature intended.[7]

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[6] See, e.g., *McKenzie v. City of Thousand Oaks* (1973) 36 Cal.App.3d 426, 432-435 (under former § 581a, service on other defendants sued jointly and severally does not preclude dismissal as against defendant who was not timely served); accord, *Watson v. Superior Court* (1972) 24 Cal.App.3d 53, 57-59. The current statutory scheme continues to implement the policy permitting separate treatment of individual parties and causes of action, where appropriate. (See Legis. Com. com., 16 West's Ann. Code Civ. Proc. (2010 supp.) foll. § 583.110, p. 116.)

[7] At oral argument, Scarpino pointed out that in this case, rather than all of the devisees except one having been served, none of the devisees were served. This is correct. However, that does not change our analysis. As we discuss below, the Probate Code provides that although devisees are interested parties who are entitled to notice of a will contest, they are not necessary parties to a will contest; only the petitioner is a

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That this result was not intended by the Legislature is further suggested by Probate Code section 8251. Section 8251 apparently contemplates that in most will contests, it is the petitioner (i.e., the person who filed the petition for probate) who will defend the will and the interests of the devisees and other interested persons. Subdivision (a) of that statute provides that the petitioner "and" any other interested person may jointly or separately answer or demur. Subdivision (c)(2) provides that if "any person" fails to answer, that person may not participate further in the contest, but his or her interest in the estate is not affected. The petitioner is expressly exempted from this provision. (Prob. Code, § 8251, subd. (c)(2).) Consequently, although Probate Code sections 8250 and 8110 require the heirs, executor, alternate executor and all devisees to be served with the summons and the contest and Probate Code section 8251 permits any of those individuals to file separate answers or demurrers, section 8251 does not deem them necessary parties to the contest. It would be entirely contradictory to hold that failure to serve an individual who may, but need not, participate in the will contest, requires dismissal of the contest, even though an answer has been filed by the petitioner or another interested person.

Second, the history of sections 583.210 and 583.250 and of the Probate Code sections pertaining to will contests supports the conclusion that the Legislature did not

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necessary party. Consequently, it is equally absurd to conclude that the Legislature intended to mandate the dismissal of a will contest which was validly served on the petitioner merely because it was not also served on the devisees or other interested parties.

intend sections 583.210 and 583.250 to apply to will contests. In *Horney v. Superior Court* (1948) 83 Cal.App.2d 262 (*Horney*), the court held that the dismissal provisions of former section 581a, the predecessor of sections 583.210 and 583.250, did not apply to will contests.[8] Probate Code former section 1233, the substantially identical predecessor of current Probate Code section 1000, was then in effect.[9] (*Horney*, at pp. 266-267.) However, the court noted that although prior cases had held that various provisions of the Code of Civil Procedure were incorporated in the Probate Code via former section 1233 or by its predecessor, it had historically been held that provisions of the Code of Civil Procedure applicable to the issuance, service and return of a summons were not among the provisions held to be so incorporated. (*Horney*, at pp. 267-269.)

At that time, notice of a will contest was served not by means of a summons, but by means of a citation. As it does now, the Probate Code directed that service of the citation was to be accomplished in the same manner as service of a summons in a civil action. (*Horney*, *supra*, 83 Cal.App.2d at p. 266, discussing Prob. Code, former §§ 370, 381, 382.) Unlike a summons, however, a citation was merely a notice to interested

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[8] Former section 581a, which provided that an action must be dismissed unless the summons is served and returned within three years after its issuance, was repealed in 1984. The Legislature replaced it and other dismissal statutes with the current statutory scheme which includes sections 583.210 and 583.250. (See *Shipley v. Sugita* (1996) 50 Cal.App.4th 320, 323; Legis. Com. com., 16 West's Ann. Code Civ. Proc. (2010 supp.) foll. former § 581a, p. 75.)

[9] Former section 1233 of the Probate Code provided, in pertinent part, "'Except as otherwise provided by this code . . . the provisions of part II of the Code of Civil Procedure are applicable to and constitute the rules of practice in the proceedings mentioned in this code.'" (*Horney*, *supra*, 83 Cal.App.2d at p. 266.)

parties of a hearing date which had already been set by the court. (*Horney*, at p. 269.) Because a hearing date had been set before the citation issued, the provisions permitting a party to obtain a summons up to a year after filing a complaint and to serve the summons up to three years from the date of issuance did not logically apply. Moreover, application of those provisions would have no effect in preventing delay in prosecuting the will contest. On the contrary, application of former section 581a would have the opposite effect, i.e., to sanction delay, because the will contestant would have up to three years to serve the citation. (*Horney*, at p. 269, and cases cited therein.) In addition, it had long been held that section 473 applied to permit a court to grant relief from default if a citation in a will contest was not timely served. Former section 581a, in contrast, provided for mandatory dismissal for failure to serve a summons within the statutory time. (*Horney*, at pp. 269-270, citing and discussing *Estate of Simmons* (1914) 168 Cal. 390.)

Scarpino contends that since will contests are now served by means of a summons rather than a citation, sections 583.210 and 583.250 necessarily apply, by virtue of Probate Code section 1000. We are not persuaded, for two reasons.

First, Probate Code section 8250 provides that a summons in a will contest shall be issued and served as provided in "Chapter 4 (commencing with Section 413.10) of Title 5 of Part 2 of the Code of Civil Procedure." (Prob. Code, § 8250, subd. (a).) This reference does not include sections 583.210 and 583.250; those sections are contained in Chapter 1.5 of Title 8 of Part 2 of the Code of Civil Procedure (see 13 West's Ann. Code

Civ. Proc. (2006 ed.) Code Civ. Proc. Analysis, p. XXVIII.) *Expressio unius es exclusio alterius*: The expression of some things in a statute necessarily means the exclusion of others. (*Gikas v. Zolin* (1993) 6 Cal.4th 841, 852.) The expression that a specified portion of the Code of Civil Procedure pertaining to service of summons applies to will contests excludes application of other portions of that code pertaining to the same subject, unless there is a clear legislative intent to the contrary. (See *People v. Palacios* (2007) 41 Cal.4th 720, 732.) Here, there is no evidence of a contrary legislative intent.

Second, Probate Code section 8250 mirrors former section 370 of the Probate Code, which provided that the citation in a will contest was to be served "in the manner provided by law for the service of summons in civil actions." (*Horney*, *supra*, 83 Cal.App.2d at p. 270.) In *Horney*, the court observed that if the Legislature had intended that former section 1233 of the Probate Code incorporate all sections of the Code of Civil Procedure applicable to the service of summons, that portion of former section 370 would have been "entirely unnecessary." (*Horney*, at pp. 270-271.) The same is true of Probate Code sections 1000 and 8250: If the Legislature had intended that all provisions of the Code of Civil Procedure pertaining to the service of summons were to apply to will contests, it would have been entirely unnecessary to specify in Probate Code section 8250 that the will contest summons is to be served in accordance with the provisions of the Code of Civil Procedure. In construing a statute, we must "'give "significance to every word, phrase, sentence, and part of an act."'" (*Smith v. Superior Court*, *supra*, 39 Cal.4th at p. 83.) "When two statutes touch upon a common subject, they are to be construed in

reference to each other, so as to 'harmonize the two in such a way that no part of either becomes surplusage.' [Citations.]" (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 778-779.) To hold that Probate Code section 1000 necessarily incorporates sections 583.210 and 583.250 with respect to will contests would violate this principle.

Furthermore, the long history of judicial holdings that the predecessors of sections 583.210 and 583.250 do not apply to will contests, despite the language of the predecessors of Probate Code section 1000, as discussed in *Horney*, *supra*, 83 Cal.App.2d at pages 266-269, persuades us that if the Legislature had intended to apply sections 583.210 and 583.250 to will contests when it amended the Probate Code to provide for a summons rather than a citation for service of a will contest, it would have said so explicitly. The Legislature is presumed to be aware of judicial construction of statutory language when it amends a statutory scheme. (*People v. Garcia* (2006) 39 Cal.4th 1070, 1088.) The Legislature was unquestionably aware of *Horney* when it enacted the statutory scheme on dismissals of civil actions in 1984: The Law Revision Commission report pertaining to that enactment states, "Subdivision (b) gives the court latitude to apply the provisions of this chapter in special proceedings where appropriate. The application would be inconsistent with the character of a special proceeding such as a decedent's estate. See, e.g., Horney v. Superior Court, 83 Cal.App.2d 262 . . . ." (Cal. Law Revision Com. com., 16 West's Ann. Code Civ. Proc. (2010 supp.) foll. § 583.120, p. 118.) Moreover, the Law Revision Commission's official comments are deemed to express the Legislature's intent. (*Fair v. Bakhtiari* (2006) 40 Cal.4th 189, 195.) We

construe this comment as further reflecting the Legislature's intention not to apply sections 583.210 and 583.250 to will contests.

Finally, the historical reason that the predecessors of sections 583.210 and 583.250 were deemed not to apply to probate proceedings is that although the purpose of those statutes is to prevent delay in prosecuting civil actions, they would not have that effect in probate proceedings because allowing three years for service would actually sanction delay. In probate proceedings, rather than having a statutory deadline for service after which dismissal is mandatory, the court has the inherent authority to dismiss for failure to prosecute the action promptly. This permits the court to dismiss a will contest in less than three years, if the court determines that the contestant has not acted with diligence in effecting service. (*Horney, supra*, 83 Cal.App.2d at pp. 269-270.)

For all of these reasons, we conclude that the Legislature did not intend Probate Code 1000 to incorporate sections 583.210 and 583.250 with respect to will contests.

In our order for supplemental briefing, we also asked the parties whether the probate court had the discretion to apply sections 583.210 and 583.250, even if those sections were not incorporated in the will contest statutes by virtue of Probate Code section 1000. (See § 583.120, subd. (b).)[10] Because sections 583.210 and 583.250 are

[10] Section 583.120, subdivision (b) provides "Notwithstanding subdivision (a), the court may, by rule or otherwise under inherent authority of the court, apply this chapter to a special proceeding or part of a special proceeding except to the extent such application would be inconsistent with the character of the special proceeding or the statute governing the special proceeding."

inconsistent with the nature of a will contest, as we have discussed, the probate court lacks the authority to apply those sections to a will contest.

Accordingly, the probate court erred when it held that dismissal of the will contest was mandatory.

That does not, of course, mean that a will contest can never be dismissed for failure to prosecute. A court has the inherent authority to manage its calendar and control the proceedings before it. (*Robinson v. Woods* (2008) 168 Cal.App.4th 1258, 1262.) Consequently, a probate court may dismiss a will contest if it determines that the contestant has failed to prosecute the contest diligently. (*Horney, supra,* 83 Cal.App.2d at p. 270.) To do so in this case, however, would be an abuse of discretion, at least in the absence of any showing that Scarpino or any other unserved interested person had suffered prejudice as a result of the contestants' failure to serve the summons and will contest. Scarpino made no such showing. Moreover, even if contestants were dilatory in serving the will contest on the devisees and other designated individuals, they were not otherwise dilatory in prosecuting the will contest, in light of the court's order staying it pending the outcome of the prior consolidated appeals.

DISPOSITION

The judgment is reversed. The cause is remanded for further proceedings on the will contest.

Contestants and appellants James Mauzey and Kelly Mauzey are awarded their costs on appeal.

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/s/ McKinster
Acting P.J.

We concur:

/s/ Richli
J.

/s/ King
J.